

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

SECOND APPEAL NO. 436 OF 1994

Shri Dwarakanath Dagdu Shahane & Anr. ...Appellants / Orig.Defendants
vs.

Shri Yashwant Bhau Nalawade & Anr. ...Respondents / Orig.Plaintiffs

Mr.K.K. Malpathak for Appellants.
None for Respondents.

CORAM : S.C. GUPTE, J.

8 FEBRUARY 2017

P.C.:

Heard learned Counsel for the Appellants. The Respondents are absent, despite notice.

2 This appeal impugns a judgment and order passed by the Additional District Judge at Nashik. By the impugned judgment and order, the learned District Judge dismissed the appeal filed by the Appellant herein from a judgment and decree passed by the Joint Civil Judge, Junior Division, Nashik decreeing the Respondents' suit and directing the Appellants to remove the encroachment portion of certain wall of his house. The decree was passed on the footing that the encroachment portion of the wall was an obstruction to the light and ventilation enjoyed by the Plaintiffs.

3 The Respondents (original Plaintiffs) had filed the present suit praying for demolition of the wall erected by the Appellants (original Defendants). This prayer was *inter alia* based on easement rights claimed by the Plaintiffs for air and ventilation through an existing window on the western wall of his house. The trial court came to the conclusion, based on

evidence led by the Plaintiff (the Plaintiff having examined himself and also a tenant who lived in the Plaintiff's house since it was owned by the Plaintiff's predecessor since his birth till about 1954-55), that the window in the western wall of the Plaintiff's house was in existence for nearly about 50 years; that the Plaintiff was enjoying ventilation and light for his house only through this window; and that the Defendant had constructed the eastern side wall of his house by making an encroachment of 1 foot in width and 40 feet in length in the wall of the Plaintiff's house and obstructed the Plaintiff's easementary right of air and light through the window. Based on these findings, the trial court decreed the Plaintiff's suit and directed the Defendants by a mandatory injunction to remove the encroached portion of the wall. The matter was carried in appeal by the Appellants herein before the District Court. The learned District Judge by concurrent findings of fact came to the conclusions that the Plaintiffs had proved that on the western side wall of their house, there existed a window of 2 feet 3 inches for more than 50 years; and that the Defendants had encroached upon the Plaintiffs' property and occupied a space admeasuring one foot on the eastern side and 40 feet on the northern side more; and that the Defendants obstructed the air and light enjoyed by the Plaintiffs through the window. The learned District Judge held that the Plaintiffs were accordingly entitled to a declaration and mandatory injunction directing the Defendants to remove the said construction made by the Defendants. On these concurrent findings of fact, no question of law arises for determination of this court.

3 Learned Counsel for the Appellants relies on evidence led by the Plaintiffs' witness, who was the original owner and landlady of the house from whom the Plaintiffs had purchased their house. It is submitted

that this landlady in her evidence actually admitted that there was no window in existence when the house was in her ownership and occupation and that the window must have been constructed by the Plaintiffs after purchase of the house property. It is submitted that the evidence of the landlady in this behalf is rejected both by the trial court and first appellate court on untenable grounds. These are matters of appreciation of evidence and unless a case of perversity is made out in the matter of appreciation of evidence, no question of law can be said to arise therefrom.

4 In the premises, there is no merit in the second appeal and the second appeal is, accordingly, dismissed. No order as to costs.

(S.C. GUPTE, J.)